No. 2822

In the United States

Circuit Court of Appeals

For the Ninth Circuit

John H. Martin, Trustee in Bankruptcy of The Imperial Copper Company, a Corporation, Bankrupt,

Appellant,

—vs.—

The Development Company of America, a Corporation,

Appellee.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This is an appeal brought to this court by John H. Martin, Trustee in Bankruptcy of The Imperial Copper Company, a corporation, bankrupt, from the decree entered by the United States District Court for the District of Arizona, on June 6, 1916, in the case pending therein, entitled John H. Martin, Trustee in Bankruptcy of The Imperial Copper Company, a corporation, plaintiff, vs. The Development Company of America, a cor-

poration, defendant, dismissing said cause for want of equity.

This action was instituted in the court below by Martin, Trustee in Bankruptcy of The Imperial Copper Company, a corporation, bankrupt, to recover of and from The Development Company of America, a corporation, all of the debts filed and allowed against the Copper Company, amounting approximately to $1,250,000 on the ground that the Development Company was the parent company of the Copper Company; that the Copper Company was merely a creature, subsidiary, agent, adjunct and instrumentality of the Development Company, and used and treated as such by the Development Company, and that the said debts were really incurred by the Development Company.

The complaint also contained allegations to the effect that the Development Company caused or procured all the properties of the Copper Company to be sold under a certain foreclosure proceeding, and that The Development Company has received or is to receive a certain interest in all of said properties through such foreclosure proceedings, over and above anything the creditors are to receive; and that the creditors of the Copper Company are entitled to have such interest subjected to the payment of their debts.

Defendant filed at the same time and as one paper, its motion to dismiss for want of jurisdiction, motion to dismiss for insufficiency of fact to constitute a valid

cause of action in equity, plea in bar, and answer to the merits.

(Transcript, pp 22 to 38).

The Court, on June 6, 1916, made and entered the following order:

"The motion of defendant in this cause, The Development Company of America, a corporation, to dismiss the complaint of plaintiff, on the ground that the same does not state facts sufficient to constitute any cause of action against it, nor any cause of action whatsoever against said defendant, having heretofore been heard and submitted to the court, Selim M. Franklin, Esq., appearing as counsel for said defendant, and Francis M. Hartman, Esq., and E. F. Jones, Esq., as counsel for plaintiff, and the court being fully advised in the premises, does hereby ORDER that said motion be sustained, and that judgment dismissing said cause be entered herein. To all of which rulings and orders, and to each of them, plaintiff excepted.

(Signed) WILLIAM H. SAWTELLE,
Judge."

The questions involved are:

(1) Did the defendant, by filing at the same time and as one paper its said motions to dismiss for want of jurisdiction, to dismiss for want of fact to constitute a valid cause of action in equity, plea in bar, and answer

to the merits, waive its said motion to dismiss for want of fact or for want of equity.

(2) Does the complaint contain sufficient allegations of fact to constitute a valid cause of action in equity against defendant.

ASSIGNMENT OF ERRORS

Appellant relies upon the following assignment of errors:

That the order, judgment and decree entered in the above entitled cause on the 6th day of June, A. D. 1916, is erroneous and unjust to plaintiff:

FIRST: Because defendant filed its answer to the merits of plaintiff's bill at the same time that it filed its motion to dismiss said bill for want of equity:

SECOND: Because the Court erred in holding that defendant had not waived its motion to dismiss plaintiff's bill for want of equity by filing at the same time its answer to the merits of said bill:

THIRD: Because the Court erred in holding that plaintiff's said bill of complaint does not state facts sufficient to constitute a cause of action against defendant.

FOURTH: Because the Court erred in suctaining defendant's motion to dismiss said complaint for want of equity and in dismissing said action.

ARGUMENT

We will discuss first, the question raised by the Third and Fourth Assignments of Error,—the sufficiency of the complaint as against the defendant's motion to dismiss for want of equity, or for insufficient facts to constitute a valid cause of action in equity.

The complaint contained allegations as follows: Tr., pp 1 to 21.

"That the plaintiff is now and has been since on or about July 2, 1914, the duly elected, qualified and acting Trustee in Bankruptcy of the Imperial Copper Company, a corporation, bankrupt, and is a citizen of the State of Arizona, and a resident of Pima County, in said State; and that the defendant, The Development Company of America, during all the times mentioned herein, was and is a corporation organized, created by and existing under and by virtue of the laws of the State of Delaware, and owning property, conducting and transacting business and having an Agent within the State of Arizona.

II

"That this suit is between citizens of different states; and is a matter or proceeding in bankruptcy. That the amount in controversy herein exceeds the sum of three thousand dollars ($3,000.00), exclusive of interest and costs.

III

"That the defendant, during all the times mentioned

herein was and is now engaged in the business of purchasing, developing and operating mining and smelting properties, and in the building and operating of railroads, in the State of Arizona.

IV

"That the said defendant, heretofore, in the year 1903, acquired, owned and held a certain contract for the purchase of certain mining properties situate at Silver Bell, Pima County, Arizona, and being those certain mining properties hereinafter more particularly described, for the price and sum of five hundred fifteen thousand dollars ($515,000.00), and that thereafter on or about May 11, 1903, defendant created and caused the said Imperial Copper Company, a corporation, to be organized under the laws of Arizona, for the purpose of consummating, carrying out and carrying into effect, the said contract of purchase, for the use and benefit of defendant, and for the purpose of purchasing, developing and operating said mining properties, for the use and benefit of defendant, and for the purpose of carrying on and conducting the business of the said defendant, for its use and benefit, in which it was so engaged as aforesaid.

V

"That all of the incorporators, directors and officers of the said Copper Company, were at all times employees of the said Development Company.

"That the said Development Company, at all the

times herein mentioned, and up until on or about March 31, 1915, owned and controlled practically all of the shares of the capital stock of the said Copper Company; and from the date of the organization of the said Copper Company and up until some time in 1911, when the said Copper Company was adjudicated a bankrupt, as hereinafter set forth, elected all of the directors, officers and managers of the said Copper Company, from its own employees, directors and officers; and controlled, directed, handled and transacted all of the business of the said Copper Company; and collected, received, handled and used all of the moneys and proceeds derived from the operation of the said mining properties, and all the profits thereof, and appropriated the same to its own use, in its business of purchasing, developing and operating mining and smelting properties as aforesaid.

VI

"That the said Development Company caused the title to the said mining properties so situate at Silver Bell, Pima County, Arizona, to be taken in the name of the said Copper Company, and caused the said mining properties to be developed and operated in the name of the said Copper Company, and for the use and benefit of the said Development Company; and that the title to the said properties was so taken in the name of the said Copper Company, and the said properties so operated in the name of the said Copper Company, as a convenience to the said Development Company and to fa-

cilitate the said business of the said Development Company of purchasing, developing and operating mining and smelting properties.

VII

"That F. M. Murphy, a resident of the County of Yavapai, State of Arizona, is now, and during all the times mentioned herein was, the President and chief officer of the said Development Company, and is now, and has been since November 9, 1909, the President and chief officer of the said Copper Company.

"That the Board of Directors of the said Copper Company was composed of seven persons, to-wit: F. M. Murphy, E. B. Gage, H. M. Robinson, Selwyn Eddy, V. L. Mason, W. F. Staunton and A. N. Gage; and that the said F. M. Murphy, E. B. Gage, H. M. Robinson, Selwyn Eddy and V. L. Mason, were, at the same time, directors in the said Development Company.

"That the Executive Committees of the said Development Company and the said Copper Company were composed of practically the same individuals, in this to-wit: that the Executive Committee of the said Development Company was composed of F. M. Murphy, E. B. Gage, H. M. Robinson, V. L. Mason and B. P. Cheney; and that the Executive Committee of the said Copper Company was composed of F. M. Murphy, E. B. Gage, H. M. Robinson, V. L. Mason and W. F. Staunton.

VIII

"That the said Development Company so created the

said Copper Company and used the same as an auxiliary, subsidiary, branch, agent and instrumentality, in conducting and carrying on its said business of purchasing, developing and operating mining and smelting properties.

IX

"That the said Development Company in 1903, caused the said Copper Company to execute a first mortgage or deed of trust upon all of said mining properties, to secure a bond issue in the sum of two million dollars ($2,000,000.00), for the use and benefit of the said Development Company, and that all of said bonds were issued and delivered to the said Development Company, and that the said Development Company used all of said bonds and the proceeds of the sale thereof in its business of purchasing, developing and operating mining and smelting properties; and that the said Development Company also used all the capital stock of the said Copper Company, of the par value of five million dollars ($5,000,000.00), and the proceeds of the sale thereof, in its said business of purchasing, developing and operating mining and smelting properties in Arizona.

X

"That the said Development Company, in furtherance of its said business of purchasing, developing and operating mining and smelting properties, in Arizona, and especially those certain mining and smelting properties situated in Pima and Pinal Counties, Arizona, hereinafter referred to, and for the purpose of carrying

on and engaging in its said business in Arizona, also, sometime in 1903 and 1904, created those two certain other dummy corporations under the laws of Arizona, to-wit, the Arizona Southern Railroad Company and the Southern Arizona Smelting Company, and elected all the directors, officers and managers of said dummy corporations, and at all times controlled and managed the affairs and business of both such dummy corporations, as bureaus or departments of its said business; and caused all the shares of the capital stock of the said two corporations to be issued to and to be held in the name of said Copper Company; and thereafter, in 1904, the said Development Company, caused all the shares of the capital stock of the said Railroad Company and of the said Smelting Company to become subject to the lien of the said mortgage or deed of trust, as additional collateral security for the said issue of bonds in the sum of two million dollars, so theretofore issued and delivered to the said Development Company.

XI

"That the mining properties so purchased, developed and operated by the said Development Company, through the said Imperial Copper Company, the said Arizona Southern Railroad Company and the said Southern Arizona Smelting Company, and so covered by the said mortgage or deed of trust, are situate in the Silver Bell Mining District, Pima County, Arizona, and in Pinal County, Arizona, and are more particularly described as follows, to wit:

(Description of properties, See Transcript, pp 7 to 11).

"That the shares of stock hereinbefore referred to as having been made subject to the lien of said mortgage by the said Development Company, are described as follows, to-wit:

"Eight thousand (8,000) shares of the capital stock of the Arizona Southern Railroad Company, an Arizona Corporation; and nine thousand (9,000) shares of the capital stock of the Southern Arizona Smelting Company, an Arizona Corporation.

XII

"Plaintiff is informed and believes and upon such information and belief alleges, that on July 3, 1911, the said Development Company being then and there the owner and holder of and controlling a majority of said bonds and the said shares of stock of the said Copper Company, caused a suit to be instituted in the then District Court of the First Judicial District of the Territory of Arizona, in and for the County of Pima, to foreclose said mortgage or deed of trust on all of the said mining properties, and on said shares of stock of said Railroad Company and the said Smelting Company, and thereafter, on December 28, 1914, obtained a decree of foreclosure of said mortgage or deed of trust, by the Superior Court of the State of Arizona, in and for the County of Pima, the successor of the last above named court, and an order of sale of all of said mining properties and of

said shares of stock; and thereafter, on March 31, 1915, the said Development Company caused all of said mining properties and said shares of stock to be sold under such foreclosure, and caused the said mining properties to be bid in at such sale, in the name of Leo Goldschmidt of Tucson, Pima County, Arizona, at the price of ninety thousand dollars ($90,000) and the said shares of stock of the said Railroad Company and said Smelting Company at the price of twelve thousand dollars ($12,000), for the use and benefit of the said F. M. Murphy, the president and chief officer of the said Development Company, and as representing the stockholders and bond holders of the said Development Company; and that the said Development Company and the said F. M. Murphy, as the real parties in interest in said purchase at such foreclosure sale, are now negotiating for the sale of all of said mining properties and said shares of stock of said Railroad Company and said Smelting Company, and have made and entered into some character of agreement with the American Smelting & Refining Company, a corporation organized under the laws of New Jersey, and transacting business in Pima County, Arizona, for the sale to the said American Smelting & Refining Company of all of said mining properties and said shares of stock, and that the said Smelting & Refining Company is now in possession of said properties and working upon the same.

XIII

"That on July 5, 1911, a petition in bankruptcy was

filed against the said Copper Company, in the then District Court of the First Judicial District of the Territory of Arizona, by certain creditors, and thereafter on July 25, 1911, the said Copper Company was duly adjudged a bankrupt; and that thereafter and prior to the first meeting of the creditors on August 12, 1911, the following claims were filed in said bankruptcy proceeding:

(List of Claims, Transcript pp 13 to 16).

"That all of the above mentioned claims have been allowed by the Referee in Bankruptcy of said proceeding, excepting the claim of El Tiro Copper Company and the Arizona Southern R. R. Co., making a total of claims allowed in said bankruptcy proceeding, of the sum of $1,280,686.22.

XIV

"That at the first meeting of the creditors in said bankruptcy proceedings on or about August 12, 1911, M. P. Freeman was elected Trustee, and acted as such until on or about July 2, 1914, at which time he resigned and plaintiff was duly elected and qualified as such Trustee.

XV

"Plaintiff is informed and believes and upon such information and belief alleges, that there was some character of agreement between the said Development Company and the said Murphy as the president and chief officer thereof, and the creditors of said estate, that said bankruptcy proceedings should lie dormant, and that the said Development Company and the said Murphy

should be allowed time within which to re-finance and rehabilitate said mining properties to enable the said Development Company and the said Murphy to raise sufficient funds with which to liquidate and pay off and discharge said debts; and that in pursuance of said agreement, and relying upon the representations and promises so made by the said Development Company and the said Murphy, the said creditors did allow said bankruptcy proceedings to lie dormant, up until some time in 1914, and until the election and qualification of plaintiff herein as such Trustee; and that any seeming delay in the institution of this action was caused by the said Development Company and the said Murphy themselves; and plaintiff further alleges that he is informed and believes and upon such information and belief alleges, that the said Development Company and the said Murphy controlled the said bankruptcy proceedings during all of said time and up until plaintiff herein was elected and qualified as such trustee.

XVI

"That the action of the said Development Company in causing all the said mining properties and the said shares of stock in the said Railroad Company and the said Smelting Company to be so sold under said foreclosure proceedings, resulted in stripping the said Copper Company of practically all of its assets, with the exception of some personal property situated at said mines, which said personal property plaintiff as such trustee caused to be advertised for sale at public auction, after due and legal notice, and that the only bid received

therefor was a bid in the sum of five hundred dollars ($500) made by George W. Dietz of Tucson, Pima County, Arizona, and he has not been able to obtain any other bid for said personal property, at private sale, than the sum of fourteen hundred dollars ($1400).

XVII

"That there has not been sufficient moneys or property come into the hands of plaintiff, as such trustee of said estate, with which to pay any dividends upon the claims so filed and allowed by the Referee in Bankruptcy in said proceedings, as hereinbefore set forth.

XVIII

"That by reason of the matters and things herein set forth, plaintiff is advised and informed, and therefore alleges, that the said Development Company of America, the defendant herein, became and is liable for all of the debts of the said Copper Company, and as filed and allowed in said bankruptcy proceedings, amounting to the sum of one million, two hundred eighty thousand, six hundred eighty-six and 22-100 dollars ($1,280,-686.22), with interest thereon at the rate of six per cent per annum from the date of said allowance; and that all of said mining properties, and the said shares of stock of the said Railroad Company and of the said Smelting Company, so purchased at such foreclosure sale by the said Development Company of America, or for its use and benefit, are liable for all of said debts."

Plaintiff prayed for relief as follows:

"1 That plaintiff have and recover judgment against the defendant, the said Development Company of America, for the said sum of one million, two hundred eighty thousand, six hundred eighty-six and 22-100 dollars ($1,280,686.22), the amount of the debts so filed and allowed in said bankruptcy proceedings, with interest at the rate of six per cent per annum from the date of such allowance.

"2 That plaintiff have judgment decreeing that all of said mining properties and the said shares of stock of said Railroad Company and said Smelting Company are liable for the claims of the creditors of said Copper Company, as filed and allowed in said bankruptcy proceedings.

"3 That the claims of the said creditors of the said Copper Company be decreed and declared to be liens upon all the right, title or interest in and to said properties acquired by the said Development Company under and by virtue of said foreclosure proceeding.

"4 That all of the said mining properties and the said shares of stock be decreed to be a part of the assets of the said Imperial Copper Company, bankrupt; that the jurisdiction of plaintiff as Trustee of said Imperial Copper Company, bankrupt, be extended to the same and that the said properties be administered upon by plaintiff as such Trustee.

"5 And for alternative relief: that the defendant, the said Development Company of America, be required

and ordered to pay over to plaintiff all sums of money derived or to be derived by it from any sale or sales of any of said properties, to the extent of the said indebtedness and claims so filed and allowed against the said Copper Company, bankrupt.

"6 And for any other, further, special or general relief, in the premises, as to the Court may seem meet and proper, and for costs."

The motion of defendant directed against this complaint is as follows:

"And said defendant, without waiving its foregoing motion to dismiss for want of jurisdiction, but if the same be overruled, further answering the said bill of complaint, alleges, that the said bill of complaint upon its face discloses an insufficiency of fact to constitute a valid cause of action in equity; and that the plaintiff has not alleged in said bill of complaint facts sufficient to constitute any valid cause of action in equity, in law or otherwise against this defendant, or any cause of action whatsoever.

"Wherefore defendant prays that said bill of complaint be dismissed."

(Transcript, p. 23.)

This motion was sustained by the District Court and the cause dismissed.

(Transcript, pp. 38-39.)

The motion to dismiss for want of equity or for insufficiency of facts to constitute a valid cause of action in equity, admits as true all allegations of the bill well pleaded, and in substance says that admitting the facts to be true, the plaintiff cannot recover.

We do not deem it necessary to cite any authorities in support of this well known rule.

The rule with respect to demurrers before the adoption of the New Equity Rules abolishing demurrers and pleas was that:

If plaintiff was entitled to any kind of relief the demurrer for want of equity would be overruled.

Or, stating it in another way, the demurrer for want of equity would be overruled unless it appeared that under no possible state of the evidence a decree could be entered.

We assume that this rule will be followed by courts of equity in passing upon motions to dismiss for want of equity.

Therefore, if the plaintiff was entitled to any kind of relief whatever under the allegations of the bill, the motion to dismiss for want of equity should have been overruled.

On the Question that a parent company is liable for the debts of its subsidiary, agent, or instrumentality, we submit the following authorities:

Interstate Telg Co v B & O Telg Co, et al, 51 Fed 49:

This was a creditors suit brought by the Interstate Telegraph Company against the B & O Railroad Company, seeking to make it liable for a judgment theretofore obtained by the Interstate Telegraph Co. against the subsidiary company, the B & O Telegraph Company. The court held that the parent company was liable for the debt of the subsidiary or agent.

The case was affirmed in 54 Fed 50, by the Circuit Court of Appeals, Fourth Circuit, which court, in its opinion, among other things, said: "It is difficult to fix the exact relation between these two companies, whether the railroad company exercised its control as the sole stockholder, that is to say as the only person having a beneficial interest in its stock, or whether as the principal controlling its agent, or whether the telegraph company was one of the bureaus or departments of this great railroad system for which a charter of incorporation had been obtained simply for convenience; or whether it exercised control as lessor over its lessee, or whether as creditor over its debtor."

Bridgens vs Dollar Savings Bank of Kansas City, et al, 66 Fed 12:

It is a settled rule of equity jurisprudence that the directors and agents of two companies are disqualified from representing both companies in a transaction where the interests of the two companies are opposed, nor will one corporation be permitted to form a company ancilliary to the original one and contract with it to the disadvantage of the creditors and stockholders of one of the companies.

Morowitz on Private Corporations, Secs 529-530:

"And a court of equity will in such case, notwithstanding the apparent legality of such transfer or transaction between two such corporations, try the same according to the real facts and equities of the case.

Citing:

McVicker v Opera Co, 40 Fed 261.

Interstate Tel Co v B & O, etc, 51 Fed 549, supra.

Trust Co v Kneeland, 138 U S 414.

Day v Postal Tel Co, (Md) 7 Atl 608.

In re Watertown Paper Co, 169 Fed 256:

"There is, as the appellees point out, a line of cases holding that when one corporation creates another corporation for a particular purpose and holds all of its stock, the latter will be treated as the agent of the former, or as an instrumentality for carrying out its

purposes. In these cases the controlling corporation has been held liable for the debts of the subordinate company." Also citing Interstate Tel Co vs B & O, etc, supra.

Joseph R Foard v State of Maryland, for the use of Gorlaski, etc, CCA, 219 Fed 827:

"The District Court was clearly right in holding untenable the position taken by the Foard Company that the loading was done by the General Stevedoring Company as an independent contractor, and that it alone was responsible for any negligence in handling the dynamite. Whatever may have been the original design when the Foard Company caused to be organized the General Stevedoring Company the evidence leaves no doubt that the stevedoring, whether done under one or the other corporate names, was in reality but a department of the Foard Company as ship brokers and agents. The two companies had the same officers. The Stevedoring Company handled no funds except through the Foard Company. Its losses were paid by the Foard Company and dealt with as though they were that company's own losses. There are other like circumstances but these are sufficient to show that the Stevedoring Company was organized and controlled and its affairs so conducted as to make it a mere instrumentality of the Foard Company. This being so the two corporations must be regarded, as to the outside public, identical." Also citing Interstate Tel Co vs

B & O etc, Supra; In re Watertown, Supra: Chicago etc v Myers, 168 Ill 139, 48 N E 66.

Nicholson v A T & S F Ry Co (Kansas), 147 Pac 1123:

This was a case where an employee was injured while working on a branch line of railroad which branch was owned by a separate corporation, The Dodge City & Cimarron Valley Railroad Company, which was created by the A T & S F Ry Co for the purpose of building and operating said branch line. The court held that the branch company was a mere instrumentality of the Santa Fe Company. To be more plain the Dodge City & Cimarron Valley Company was a mere ledger heading in the Santa Fe Company's system of accounting, which did not break the relation of master and servant existing between the plaintiff and defendant when plaintiff was placed in charge of the construction train.

Linn & Lane Timber Co v U S, (CCA 9 Cir) 196 Fed 593:

The doctrine of separate legal entity of a corporation as distinct from its members cannot be invoked in a court of equity to cover a fraud, but in such cases the court will look beyond the corporate form to the purpose of it, and whatever would be binding upon the members composing it will be held binding upon the corporation.

And cases cited.

Cook on Corporations, 7th Ed Sec 663, p 2139:

"And where a bankrupt partnership owns the entire capital stock of a corporation the bankruptcy court will consider the corporation as merely an agent of the partnership and will extend its jurisdiction over its property and determine in the bankruptcy proceedings the respective rights of the creditors of both concerns." Citing in re Rieger, 157 Fed 609.

In re McCarthy Port Elevator Co, 196 Fed 247-251:

"A corporation is a legal entity and ordinarily will be treated as distinct from its membership. But a court of equity will look beyond this technical doctrine of existence independent of its shareholders when the rights of the parties require it." Citing Morowitz on Private Corporations, 2nd Ed, Secs 1,227 and 229.

Cornell v Corbin, 64 Cal 197-200:

Where several persons owned a mine and a corporation was organized to which the mine was conveyed, the Supreme Court of California held that the corporation was formed as a mere agency in carrying out the agreement between the parties. The court said: "In cases like the present a court of equity reaches beyond the form and shadow of things and grasps the substance. In this case the formation of the corporation was a part

of the transaction at its inception and its existence was used to carry out the plan. We can repeat with reference to the facts of this case what was said by this court with reference to the facts in Short v Baudry, 56 Calif 446, that the corporation was formed as a mere agency for more conveniently carrying out the agreement between the parties is sufficiently apparent. The relation which the corporation sustained to Cornell, Hardy and Corbin was substantially, if not technically that of trustee.

Shorb v Beaudry, 56 Calif 446:

Where several parties owned land and water rights and agreed among themselves to purchase and acquire other lands and water rights, they agreed to incorporate a company and to convey and to procure to be conveyed lands and water rights to the corporation. The Court held that the corporation was formed as a mere agency for more conveniently carrying out the agreements between the parties.

Hunt v Davis, (Calif), 66 Pac 957:

Where two individuals organized a corporation to run a newspaper, the court held that the corporation was a mere agency for more conveniently carrying out the agreements of the parties, following Shorb v Beaudry.

Kelly vs Ning Young Beneficial Assn. (Cal) 84 Pac 321:

The defendant was a corporation composed of Chinese persons in San Francisco and it caused a subsidiary corporation to be organized to own and hold a cemetery, owning all of its stock, etc, Held that the defendant, the parent company was liable for services performed by an attorney for the subsidiary company.

Clere Clothing Co v Union Trust & Savings Bank.

In re Prager-Schlfsinger Company's estate, (CCA 9th Cir) 224 Fed 363:

Two cases.

Hoiding that where one corporation owns and controls all of the stock of another, that the parent company is liable for the debts of the subsidiary corporation. Citing in re Muncie Pulp Co. 139 Fed 546.

See also:

In re Muncie Pulp Co 139 Fed 546.

Day v Postal Tel Co, 66 Md 354, 7 Atl 608.

In re Horgan, 97 Fed 319.

Cole v Price, 22 Wash 18.

In re Rieger etc, 157 Fed 609.

Cook on Corporations, 7th Ed, Vol 3, p 2432, Sec 709.

Same, Vol 3, p 2139.

In re McCarthy, 196 Fed 251.

In re Southwestern Bridge & Iron Co, 133 Fed 568.

In re Boston H & E RR Co, 9 Blatchford 109, Fed case 1677.

Salt Lake Val. Can. Co. et al v Collins, CCA 9th Cir, 176 Fed 91.

In re Alaska Am. Fish Co. et al 162 Fed 498.

Colonial Trust Co v Montello Brick Wks, CCA, 172 Fed 312-313.

Applying the principle so announced by the overwhelming weight of authority to the facts as alleged in the bill, it follows that the Development Company, the parent company of the Copper Company, was and is liable for all of the debts of the Copper Company.

We contend also, that the bill states facts sufficient to entitle plaintiff as trustee in bankruptcy of the copper company, to recover, as a part of the assets of the bankrupt estate, whatever interest the Development Company may have acquired in the properties described in the complaint, under the foreclosure proceedings.

Western Union Tel. Co., v. United States & Mexican Trust Co., et al., C. C. A. 221 Fed 545.

And cases therein cited.

Can the action be maintained by the Trustee in Bankruptcy of the Copper Company?

Appellee will no doubt contend that it cannot and that the action can only be maintained by the creditors themselves and by separate actions on each one of their claims.

As a general rule the prima facie presumption is always in favor of a plaintiff's right and capacity to sue until something is properly averred against it.

Enc P & P, Vol 15, p 471.

This action is brought by the trustee in bankruptcy for the benefit of the creditors of the Copper Company, bankrupt, the names of the creditors and amounts of their respective claims being set forth in the bill, (transcript pp 13 to 16) and the fruits of the recovery belong to the bankrupt estate to be applied towards the payment of the claims of the creditors.

It is an equitable action growing out of the relationship existing between the bankrupt and the Development Company, and is such an action as cannot be maintained by the creditors.

The trustee is the proper party and the only party to bring the suit.

If the bankruptcy of the Copper Company had not intervened the creditors could have maintained such an action, and the Copper Company would have been a necessary party to any such action instituted by the creditors. But, upon the bankruptcy of the Copper

Company, no action of any kind could be commenced or maintained against the Copper Company, because bankruptcy arrests all such proceedings, and the only thing the creditors could do was to file their claims in the bankruptcy proceedings.

The Bankruptcy Act, Sec 47a, provides that such trustees "as to all property in the custody or coming into the custody of the bankruptcy court shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied."

By Sec 67b of the Bankruptcy Act it is provided: "Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and **may enforce such rights of such creditor for the benefit of the estate."**

The trustee is really subrogated to the rights of the creditors.

Collier on Bankruptcy, 9th Ed, p 941, et seq:

"The majority of cases under the law of 1867 held that, since the bankruptcy arrests proceedings in the

state courts, the assignee (trustee), as the representative of the whole body of creditors, could bring any of that class of equitable actions where the existence of a judgment and execution returned unsatisfied are necessary elements; i. e., that he was in effect, if not in name, a judgment creditor."

"RULE UNDER THE PRESENT ACT—The rule formerly existing has been applied under the present act. This seems justified in view of the words, 'May enforce such rights of such creditor for the benefit of the estate.' ".

Loveland on Bankruptcy, 4th Ed, 1057:

"The trustee, as representing the bankrupt's creditors, is the proper party plaintiff in suits to recover property for the estate."

"The right to bring suits to collect and recover property is expressly given to the trustee by the Act."

In re Crystall Bottling Co, 96 Fed 945:

This was a case where the trustee was seeking to collect from the stockholders of the bankrupt corporation balances due on stock subscriptions for the benefit of the creditors. The court said that the trustee had a right to issue a call upon the stockholders for the amount due upon their subscriptions to the amount necessary to pay the deficiency on the claims, and ordered the call

enforced by suit brought by the trustee in the United States Court.

The court also said that this was such a suit as could not be brought by the bankrupt corporation but could be brought by the trustee, and that there could be one suit in equity for the adjustment of the whole matter. Citing Scovill v Thayer, 105 U S 143, 26 L Ed 968; and Patterson v Lind, 106 U S, 519, 27 L Ed 265.

In re Bothe, CCA, 173 Fed 597:

A trustee in bankruptcy stands for and represents all persons interested in the estate of the bankrupt.

Babbitt v Read, CCA, 173 Fed 712:

In which it is held that the right of the corporation to enforce a liability of its stockholders for the purpose of paying its debts passed to the trustee.

Trustees of the Mutual Building Fund & Dollar Savings Bank v Bossieux et al, 3 Fed 817:

This was a case under one of the old bankruptcy acts in which the point was raised directly by demurrer that the trustee in bankruptcy did not have the authority to bring or maintain the suit. The court overruled the demurrer and held that the trustee had a right to maintain the action because the fruits of the recovery belonged to the estate for the benefit of the creditors. This decision is based upon good and sound reasoning.

In re Newfoundland Syndicate, 196 Fed 443:

This was a suit brought by the trustee of a bankrupt to enforce a statutory liability upon stockholders for the full par value of the shares for the benefit of the creditors.

Skillin v Magnus et al, 162 Fed 689:

This was a suit by a trustee in bankruptcy to recover unpaid subscriptions to the stock of the corporation.

Held that such a suit could be maintained by the trustee and could not be maintained by the bankrupt.

Courtney v Fidelity Trust Co, CCA, 219 Fed 57-64:

While this case is not directly in point, it holds: "It has been frequently decided that creditors' rights which are enforcible under state statutes accrue to a trustee in bankruptcy, although such rights are not available to him under the limitations of the Bankruptcy Act."

Other cases:

In re Miller Elec Co, 111 Fed 515.

In re Eureka Furn Co, 170 Fed 485.

Equity Rule 37 (New Equity Rules 1912) provides:

"Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought."

This equity rule, it seems to us, gives the trustee the right to sue.

The familiar rule against multiplicity of suits would also seem to be applicable to the question. It appears from the bill that there are thirty-six creditors of the bankrupt copper company, the largest being for the sum of $725,966.43, and the smallest for $70.15, necessitating thirty-six separate suits if the creditors are required to bring the suits in their own names.

It certainly will not be contended by Appellee that a recovery by the trustee in this action against the Development Company, for the benefit of the estate and the creditors, would not be a complete bar to any action that might be instituted against the Development Company by the individual creditors to recover on the same cause of action.

This alone ought to dispose of the question.

First and second assignments of error.

As pointed out hereinbefore, the defendant filed at

the same time and as one paper, its motion to dismiss for want of jurisdiction, motion to dismiss for want of equity, plea in bar and answer to the merits. (Transcript pp 22 to 38).

Defendant did not specify in its answer that it did not waive its motion to dismiss for want of equity. It did, however, specify that it did not waive its motion to dismiss for want of jurisdiction. (Transcript, p 30).

We now contend, as we did below, that defendant, by filing its answer at the same time as filing its motion to dismiss for want of equity, and as one paper, waived its motion to dismiss for want of equity.

Equity Rule No 29, Hopkins New Federal Equity Rules, p 162.

Simpkins Federal Suit in Equity, p 436.

Strang v Richmond P & C R Co et al, CCA, 101 Fed 511.

In re Cooper Bros, 159 Fed 956.

Sage Land & Imp Co v Ripley, CCA, 192 Fed 785-787.

Defendant's motion to dismiss for want of jurisdiction was waived in the court below. At any rate, as we understand the law, there was no merit in the motion. The complaint shows requisite diversity of citizenship and amount involved in excess of $3000.00.

In conclusion we earnestly insist that the decree of the District Court sustaining defendant's motion to dismiss for want of equity and dismissing the action should be reversed with directions to the District Court that said motion be overruled.

Respectfully submitted,

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